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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
JEFF HATCH-MILLER
WILLIAM A. MUNDELL
KRISTIN K. MAYES
GARY PIERCE

In the matter of:

AGRA-TECHNOLOGIES, INC. (a/k/a ATI), a Nevada corporation, 5800 North Dodge Avenue, Bldg. A Flagstaff, Arizona 86004-2963;

WILLIAM JAY PIERSON (a/k/a BILL PIERSON), and SANDRA LEE PIERSON (a/k/a SANDY PIERSON), husband and wife, 6710 Lynx Lane Flagstaff, Arizona 86004-1404;

RICHARD ALLEN CAMPBELL (a/k/a DICK CAMPBELL), and SONDRA JANE CAMPBELL, husband and wife, 8686 West Morten Avenue Glendale, Arizona 85305-3940;

WILLIAM H. BAKER, JR. (a/k/a BILL BAKER), and PATRICIA M. BAKER, husband and wife, 3027 N. Alta Vista Flagstaff, Arizona 86004;

JERRY JOHNSTON HODGES, 1858 Gunlock Court Saint George, Utah 84790-6705;

LAWRENCE KEVIN PAILLE (a/k/a LARRY PAILLE), 220 Pinon Woods Drive Sedona, Arizona 86351-6902;

Respondents.

DOCKET NO. S-20484A-06-0669

SECURITIES DIVISION'S MOTION FOR RULING THAT RESPONDENTS' "ORE RIGHTS & MINING AGREEMENT" INVESTMENTS ARE UNREGISTERED SECURITIES

(Administrative Law Judge Marc Stern)

To decrease the issues for the October, 15 2007 hearing, and pursuant to R14-3-106(F) & (K), the Securities Division ("Division") respectfully moves the Court to issue a ruling that Respondents' "Ore Rights & Mining Agreement" investments constitute unregistered "investment contract" securities under A.R.S. § 44-1801(26), the *Howey* Test, Arizona law and the undisputed facts.

Alternatively, the investments are securities because they constitute Commodity Investment Contracts under the unambiguous language of A.R.S. §§ 44-1801(3),(6),(17) &(26).

I. ARGUMENT[1]

1. The Ore Rights & Mining Agreements Constitute "Investment Contract" Securities Under A.R.S. § 44-1801(26), the *Howey* Test and Arizona Law.

A "security" is simply defined by A.R.S. § 44-1801(26) as any "investment contract." Under the Supreme Court's decision in *S.E.C. v. Howey*, 328 U.S. 293, 300-301, 66 S.Ct. 1100, 1103-04 (1946), an investment contract exists if there is: (1) an investment of money, (2) in a common enterprise, (3) with profits based solely on the efforts of others.[2]

The word "solely" in the last element of the *Howey* test has since been uniformly construed to mean "substantially." *S.E.C. v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9th Cir. 1973); *Sullivan v. Metro Productions, Inc.*, 150 Ariz. 573, 577, 724 P.2d 1242, 1246 (App. 1986)("The Ninth Circuit, in *Turner Enterprises,* supra, noted that the word 'solely' in the *Howey* test is not to be read as a literal limitation on the definition. That court held 'we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential

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[1] This Motion is supported by the Division's Statement of Facts filed contemporaneously herewith, and incorporated herein by reference. (Hereafter, "**SOF, ¶__**").

[2] In *Howey*, the Court held that investors who purchased fractional interests/lots in an orange plantation expected profits solely from the efforts of the promoters. The Court noted that the promoters:

> are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment. Indeed, individual development of the plots of land that are offered and sold would seldom be economically feasible due to their small size. Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area.

managerial efforts which affect the failure or success of the enterprise.'...The emphasis in determining whether an investment is a security is on economic reality.").

Two tests have been developed to determine the existence of the "common enterprise" element: (1) horizontal commonality; and (2) vertical commonality. *Daggert v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986). The commonality element is satisfied if horizontal *or* vertical commonality is demonstrated. *Id.*, 152 Ariz. at 566, 733 P.2d at 1149. Horizontal commonality requires a pooling of investor funds collectively managed by the promoter. *Id.* at 565, 733 P.2d at 1148. Vertical commonality is established if there is a correlation between the potential profits of the investor and the promoter. *Id.*

Arizona courts agree that the "investment contract" definition of a security embodies a flexible principal, "that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits." *Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (App.1998). This flexible approach recognizes the investor's economic reality and maximizes the protection that the Arizona Securities Act provides to Arizona investors. *Rose v. Dobras*, 128 Ariz. 209, 212, 624 P.2d 887, 890 (App.1981)("The supreme court has consistently construed the definition of 'security' liberally.").[3]

The *Howey* case involved the sale of fee interests in land planted to grow oranges, in narrow strips of one or more acres coupled with the offer of a management or service contract. The seller of this land (a corporation operating orange groves) agreed to lease back from the investors the individual

[3] With respect to admissions against interest by a party opponent, Respondent Campbell filed a "*securities* fraud" lawsuit against Respondent Agra. (See, Tab 18, January 25, 2006 Division Motion for Ruling on Privileged Documents). Also, the Preamble to the Securities Act states:

> The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable business practices, the suppression of fraudulent or deceptive practices in the sale or purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted interpretation or construction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

parcels. Another company, under the same common control and management as the seller company, was to cultivate, harvest, and market the crop. The selling literature emphasized the profit-making potential of investment in the production of oranges and the experience and expertise of the seller. The Court found that the offerees resided in distant localities and lacked the equipment and experience necessary to cultivate, harvest, and market citrus products themselves. Also, considering the small size of the acreage offered, investors apparently did not have the desire or ability to occupy the land, but were attracted solely by the prospects of a return on their investment from the management efforts of the seller. *Howey*, 328 U.S. at 300-301, 66 S.Ct. at 1103-04.

Howey is analogous to this case in all respects. First, there is no question that investors invested money with Respondents by purchasing the Unit contracts with an expectation of profit. **(SOF, ¶¶1-4)**. Second, both horizontal and vertical commonalities exist. Respondents pooled the Unit Contract investor money together in a common account, in part, to build a purported precious metal recovery plant and to purchase and develop alleged precious metal recovery technologies and processes. **(SOF, ¶7)**. Under the plain language of the Unit Contracts, Respondents and the Unit Contract investors furthermore agreed to share any profits from Respondents' purported extraction of platinum from the volcanic cinders. **(SOF, ¶6)**.

Finally, the Unit contract investors expected a profit solely from the efforts of Respondents. It is undisputed that the "passive" Unit Contract investors did not, for instance: (1) purchase 50+ tons of volcanic cinders for use in creating cinder blocks, or for land or road fill; (2) do not have the capability of producing any marketable quantities of platinum, gold or silver from their tonnage of volcanic cinders on a cost effective basis; (3) did not request that Respondents deliver their tonnage of volcanic cinders to their residence, especially since many of the investors reside in distant locals such as Great Britain and Canada; and (4) do not have any rights to manage or control Respondents' business affairs. **(SOF, ¶¶9-11)**. Regarding the success or failure of Respondents' alleged precious metal recovery business, Respondents' efforts are the undeniably

significant ones. *Sullivan,* 150 Ariz. at 577, 724 P.2d at 1246. The Unit Contracts are clearly not registered to be sold within or from Arizona. **(SOF, ¶¶14-15).**

Because the Unit Contracts constitute investment contracts under A.R.S. § 44-1801(26), the *Howey* test, Arizona law and the undisputed facts, the Court should issue an order holding that the Unit Contract investments constitute unregistered securities.

2. <u>Alternatively, the Unit Contracts Constitute "Commodity Investment Contract" Securities</u>.

A "commodity investment contract" is unambiguously defined as:

> ...**any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities**, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract or otherwise. **Any commodity investment contract offered or sold, in the absence of evidence to the contrary, is presumed to be offered or sold for speculation or investment purposes. A commodity investment contract does not include any contract or agreement which requires, and under which the purchaser receives, within twenty-eight calendar days after the payment in good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.**

A.R.S. § 44-1801(6)(emphasis added). A "commodity" is defined in relevant part as:

> ...**any**...metal or mineral including a **precious metal**...and all other goods...of any kind...

A.R.S. § 44-1801(3)(emphasis added). "Precious Metal" is obviously defined by the Securities Act to include any platinum, gold or silver. A.R.S. § 44-1801(17). The Securities Act defines a security as any commodity investment contract. A.R.S. § 44-1801(26). *See, also, State v. Goodrich,* 151 Ariz. 118, 726 P.2d 215, (App. 1986)(held that gold and silver contracts that were sold for 30% down payment based on public market quotations of prices made on boards of trade and exchange and which did not require delivery before one year and a day from purchase, were "commodity investment contracts" and were "securities," even if particular selling price exceeded or was less than public market quotations based on security sellers' administrative costs and

commissions); *Eastern Vanguard Forex, Ltd., v. A.C.C.*, 206 Ariz. 399, 409, 79 P.3ed 86, 96 (2003)(Treasury Amendment to the Commodities Exchange Act did not preempt Commission's jurisdiction to conduct hearing to determine legality of off-exchange foreign currency trading transactions).

Applied here, the Unit Contracts constitute "commodity option investment" securities. First, the Sheep Hill volcanic cinders are commodities as defined by A.R.S. § 44-1801(3).

Second, the Unit Contracts document, "the purchase or sale, primarily for speculation or investment purposes" and not for personal use or consumption by investors of multiple tons of the volcanic cinders/commodities. **(SOF, ¶9)**. The Unit Contract investors did not purchase volcanic cinders for their personal use or consumption to, for instance, landscape their front yards.

Finally, the Unit Contracts do not require Respondents to provide to their investors with any precious metals/cash within 28 days of execution of the Unit Contracts. Originally, the Unit Contracts stated that Respondents would process the investors' volcanic cinders within 12 months. Given their failure to produce any marketable quantities of any precious metals from the volcanic cinders on a cost effective basis to date, Respondents eventually changed their Unit Contract to state that they would process the cinders within 18, and then to state that they might process them within 24 months. **(SOF, ¶5)**; *also, e.g., State ex. rel. Corbin v. Goodrich*, 151 Ariz. 118, 726 P.2d 215, (App. 1986)(gold and silver contracts sold for 30% down payment based on public market quotations of prices made on boards of trade and exchange and which did not require delivery before one year and a day from purchase, were "commodity investment contracts" and were "securities"). To date, despite selling the Unit Contract securities since at least July 2003, Respondents have not even processed any of the volcanic cinders purchased by the Unit Contract investors or paid any returns to their Unit Contract investors. **(SOF, ¶6)**.

Because the Unit Contracts alternatively constitute commodity investment contracts, the Court should enter an order holding that they constitute unregistered securities under A.R.S. §§ 44-1801(3),(6)&(26).

II. CONCLUSION.

Based on the foregoing, the Securities Division respectfully requests that the Court rule that Respondents' "Ore & Rights & Mining Agreement" investments constitute securities under the Arizona Securities Act, the undisputed facts and applicable Arizona law.

RESPECTFULLY SUBMITTED this 12 day of June, 2007.

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